IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

FRIDAY, THE 19TH JANUARY 2007 / 29TH PAUSHA 1928

CRL.A.No. 2189 of 2004(D)

SC.319/2001 of ADDL. SESSIONS COURT (ADHOC) FAST TRACK-I, MANJERI
CP.7/2001 of JUDL.MAGISTRATE OF FIRST CLASS COURT-II, PERINTHALMANNA
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APPELLANT/APPELLANT:

KRISHNAN, S/O.KUNHAN,
CONVICT NO.761,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.DEEPU THANKAN

RESPONDENT/RESPONDENT:

THE STATE OF KERALA

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. Koshy & K.P.Balachandran, JJ.

Crl.A.No. 2189 Of 2004

JUDGMENT

Koshy, J.

The appellant was convicted and sentenced for life with fine of Rupees two thousand for murdering one Babulkanti @ Kutty after 8.30 p.m. on 18.8.2000. The brother of the deceased (PW1) gave Exhibit P1 F.I. statement at 10.30 a.m. on 19.8.2000. According to him, in the early morning some of his friends taken him to Nelliparambu Toddy Shop, where he saw the dead body of his brother lying in the floor of the veranda of the toddy shop with a slicing wound on his neck. None of the persons were suspected by the brother (PW1), but requested the police to investigate into the murder.

2. There is no direct evidence and the prosecution relied on circumstantial evidence.

Therefore, we are considering the evidence relied on by the prosecution to prove the guilt of the accused. PW6 is the salesman of the toddy shop. He deposed that the accused Krishnan as well as the deceased are regular customers of the toddy shop. The deceased came to the toddy shop at 10 O'clock in the morning and purchased a bottle of toddy. After paying the cash for the same, he asked change for five hundred rupees note. When asked about whether the five hundred rupee note was a fake one, he gave another five hundred rupee note. Then one Abu came there. When the deceased and Abu were sitting in the toddy shop, PW6 went to his house for taking lunch. According to him, a five hundred rupee note and another three hundred rupees was entrusted by the deceased with him. When he came after lunch at about 1.45 p.m., he saw the deceased sleeping on the floor of the toddy shop. Even though he asked him to go home, he did not go as there was rain. He again purchased one bottle of toddy and drank some and gave the balance to his

friends. Several persons came there for drinking. According to PW6, even after giving back the money entrusted to him, the accused did not go. In the evening one Babu and PW11 Haridasan came there. By 8 O'clock, the accused also came there and purchased one litre of toddy. The toddy shop is used to be closed down by 8.45 p.m. So, when he went to close the toddy shop, the deceased said that he will lie there and he is not coming with him. PW11 tried to take the money from the pocket of the deceased for entrusting the same with PW6. The deceased resisted and caught hold of the pocket of Haridasan (PW11) and the shirt was torn of. But, PW11 took money from the pocket of the deceased and found that there was Rs.850/-. Rs.700/- was entrusted with PW6 and the balance Rs.150/- was taken as damages by Haridasan as his shirt was torn of. At the time of closure of the shop, Haridasan requested for one litre of toddy. That was also given. When the shop was closed, the deceased refused to go. He and the accused went to

the eastern side. The deceased and PW11 went to the western side. PW6 and the accused came up to the side of the railway track and merely because it was stated that at the time of inquest he was not present, PW6 was declared hostile and cross-examined by the Prosecutor. During cross-examination, he stated that apart from himself accused Krishnan, PW11 Haridasan and PW12 Chandradasan alias Babu were taken into custody and they were put in the lock up. They were released only after four days of the formal arrest of the accused. Employer of PW6 also visited the police station.

3. The evidence of PW6 would reveal that the accused, PW11, PW6 and the deceased were the only four persons available in the toddy shop at the time of closure of the shop apart from the deceased, who remained there, while they left. The evidence further shows that there was an altercation regarding the money in his custody with PW11 Haridasan and if the above evidence is

believed, in that evening the last incident was the quarrel between PW11 and the deceased and finally, Rs.850/- belonging to the deceased was forcibly taken by PW11. The shirt of PW11 was also torn of. PW6 further deposed that there was no previous quarrel between the accused and the deceased or with him in the toddy shop.

4. The next relevant evidence is the evidence of PW11 Haridasan. According to him, he went to the toddy shop on 18.8.2000 at about 6.30-6.45 p.m., where, at that time, the deceased was sitting after drinking. By 7 O'clock, the accused also came there. He also admitted that from the pocket of the deceased, he took Rs.850/- and entrusted Rs.700/- to PW6. He also stated that Rs.150/- was taken by way of damages because his shirt was torn of. He further stated that he has not seen any dispute between the accused and the deceased.

So, the evidence of PW6 and PW11 only show that the accused and the deceased were there at the toddy shop and at the time of closure of the shop. Their evidence will not connect the accused with the crime, if at all doubt is with regard to PW11, who has snatched away money forcibly from the pocket of the deceased.

5. PW12 only stated before the court that he also went on that day to the toddy shop, where the accused, deceased, etc. were and there was no quarrel on that day and at the time when he was leaving, the deceased alone was sitting in the toddy shop.

6. The next serious evidence is the evidence of PWs 2 to 4. All the three witnesses are neighbours of the deceased as well as the accused. They all said that in between 8.45 p.m. and 10 p.m. they saw the accused near the railway track. Whether the accused came there after the drinking or before etc. are not clear. Mere presence of the accused in the railway track, which is about 1.75

kms. away from the toddy shop alone will not connect the accused with the crime. For going to the toddy shop or coming back to his house, the accused is bound to cross the railway track.

7. The other important evidence relied on is the evidence of PW10, the wife of the deceased. She has not stated anything connecting the accused with the crime. She only stated that when her husband went on 18.8.2000 he was wearing lungi and green shirt and she identified the dresses and the chappal worn by him. It is not clear from the recorded deposition whether PW10 was allowed to be cross-examined or not. She also did not say anything about the previous enmity between the accused and the deceased or anybody else. PWs 17 and 18 were examined to say that about four months back, during the pooram festival, there was quarrel between the accused and the deceased. But, that will not in any way connect the accused with the crime, as the evidence would show that the accused and the deceased used to go together for drinking.

PW9, who is conducting a club, stated that the accused and the deceased used to come in the club for playing cards. The prosecution witnesses had no case that even on the day of the incident, when they were drinking together, there was any quarrel between the accused and the deceased.

8. The injuries noted in Exhibit P6 post mortem certificate are as follows:

> "1. Contused abrasion 1 x 1cm on top of left shoulder 8cm to the left of root of neck.
>
> 2. Incised gaping wound 18 x 9 x 4cm (width of neck) transversely placed on front of neck. Margins of the wound, left end 7cm below ear, right end 4cm below ear. Left end showed two side cuts. Right end showed two side cuts 4cm apart, wind pipe was cut just below vocal cord. Carotid arteries, veins and muscles of front of neck was cut. The wound caused chipping of periosteum of cervical vertebrae between 3 & 4 and structures on

> either sides of vertebrae.
>
> 3. Incised wound 3.5 x 1.5cm on left end of injury No.2 8cm below ear. The front portion formed was with skin connection 0.2cm broad."

The opinion to the cause of death by the doctor is that the deceased died due to the cut injury on the neck (Injury No.1). PW13, the doctor, in cross-examination, stated that the fatal injury by MO1 knife itself is very difficult to cause death unless the injury was affected with great force, while there was no resistance. The relevant portion of the cross-examination is as follows:

> "Possibly injury No.2 might have been caused by cutting with force. It is very difficult to slice injury with MO1. By repealed cut, the internal vessel and muscle etc. could come out. (court's question) Whether the internal materials were projected outside? No, the width of the injury was 9 cm and the internal

materials were visible. I have not seen scattering of muscles, cartilages or fibres. I agree that by cutting with MO1 chipping of periosteum of cervical vertebrae could be caused. Not by slicing. According to my observation, injury No.2 could be caused with MO1 by applying enough force. I agree if heavy force is used to inflict injury No.2, there is every possibility of involving the chin. I have not seen injury on the chin. In that portion injury may caused on clavicle and cheek (within voluntarily explained. If the victim was lying on his back, there may not be any injury on the nearby portions of the body). My definite opinion is that injury No.2 might have been caused with a knife like MO1, by inflicting more than one cut. There were side cuts under injury No.2. The structures in the neck portion are closed attached. Only a single blow is seen inflicted to cut wind pipe, artery and vocal cord. I agree that only a single injury is caused on the wind pipe, artery and wind pipe and cartilages, muscles and vein. On there structure I did not see a

> second cut. If MO1 is used with great force, the larynx might have been injured cut."

Further, the doctor stated to the suggestion by the court that if he was lying unconscious or fully drunken this could have been inflicted by force, as there would be no resistance. But, even though the prosecution case was that he was drinking from morning till PW6 and others left the place, there is no case that there was alcohol in the stomach of the deceased. There was no smell. If he had vomited, there would be smell. The doctor deposed as follows:

> "There will be corresponding injuries on the back portion of the victim, if he was lying on the floor. There is every chance of causing injury on the assailant, if the victim had struggled. I have not noted any unusual smell on the victim. If the victim is under the influence of alcohol and if he has not

vomited there will be foul smell."

There is no case that he has vomited and in the scene mahazar also there is no evidence for the same. In these circumstances, it is doubtful whether the injuries were inflicted by MO2, which is recovered from the house of the accused.

9. The only other evidence that was relied on by the prosecution to connect the accused with the crime is the recovery of MO1 knife, MO2 torch and MO3 from the house of the accused, alleged to be on the basis of the confession statement given by the accused, admissible under Section 27 of the Evidence Act. The learned counsel for the appellant submits that there is no admissible recovery under Section 27 of the Evidence Act because there is no authorship of concealment. He only stated that if he is taken to his house, the above material objects can be taken from the house. His statement is as follows:

Recovery was effected under Exhibit P2 seizure mahazar. It is true that Exhibit P2 mahazar is also proved by mahazar witness PW5. The learned counsel for the appellant relied on the decision of the Supreme Court in **Dudh Nath Pandey v. State of Uttar Pradesh** [(1981) 2 SCC 166] to show that unless there is authorship of concealment, it cannot be relied on. The Supreme Court held in paragraph 15 of the judgment as follows:

> "Were this a case of circumstantial evidence, different considerations would have prevailed because the balance of evidence after excluding the testimony of the two eyewitnesses is not of the standard required in cases dependent wholly on circumstantial evidence. Evidence of recovery of the pistol at the instance of the appellant cannot by

> itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery is woefully vague to identity the authorship of concealment with the result that the pointing out of the weapon may at best prove the appellant's knowledge as to where the weapon was kept. The evidence of the ballistic expert carries the proof of the charge a significant step ahead, but not near enough, because at the highest, it shows that the shot which killed Pappoo was fired from the pistol which was pointed out by the appellant."

He also relied on the three member bench decisions of the Supreme Court in **Jaffer Hussain Darlifer v. State of Maharashtra** (AIR 1970 SC 1934) and in **Mahabir Biswas v. State of West Bengal** ((1995) 2 SCC 25). The learned Public Prosecutor has argued that since the knife and torch were taken from the appellant's own house, it is for the appellant to explain who put them there and therefore, an adverse inference can be taken and relied on the

decision in **State of Maharashtra v. Suresh** (2006 Crl.L.J. 2630). It is true that Exhibit P14 chemical examination report shows that the knife and torch recovered contained stains of human blood. The dress, taken from the accused, did not contain even blood stains as per Exhibit P14 report. Recovery of dress of the accused from his own house will not connect the accused with the crime. But, with regard to the blood stains found in MOs 1 and 2, no steps were taken by the Investigating Officer to find out the blood group. It is not stated that the group was tested and blood was insufficient to tally with the blood stains found in the material objects, even though blood taken from the place of occurrence. Even no investigation was conducted to find out the blood group of the deceased also. It was also argued that even if recovery is accepted, since it was not proved that the blood stains in the material objects was that of the deceased, merely on the basis of recovery evidence a conclusion cannot be

reached. It is true that if there are any other circumstantial evidence, recovery of material objects on the basis of the confession admissible under Section 27 of the Evidence Act, also can be taken as a corroborative evidence. The question as to whether that alone can be based to reach a conclusion, especially when the blood group of the deceased was not found in the weapons recovered. In any event, it can be possibly concluded that in view of medical evidence that MO1 was the knife used in the crime and there is no authorship of concealment, there is no other evidence in this case to connect the accused with the crime. In a case of circumstantial evidence, the court has to be on its guard to avoid damages of being swayed by emotional considerations. For convicting the accused guilty on the basis of circumstantial evidence, court should be satisfied that all the links in the chain are complete and only hypothesis possible on the basis of the evidence adduced is that the accused and accused alone is guilty of the

offence [see **C.K.Raveendran v. State of Kerala** (JT 1999(9) SC 408) and **Jaswant Singh v. State (Delhi Administration)** (AIR 1979 SC 190)]. Mere suspicious circumstances are not enough to convict a person guilty of murder. Circumstantial evidence should be like spiders web leaving no exit for the accused to step away. It should not only consistent with the guilt of the accused, but should be inconsistent with his innocence, as held by the Apex Court in **Mangleshwari Prasad v. State of Bihar** (AIR 1954 SC 715). It has been repeatedly held by the Apex Court that distinction between 'may be true' and 'must be true' is long and divides vague conjectures from sure considerations and each must be established by clear and unobjecting circumstances.

10. In this case, from the evidence adduced, it cannot be stated that prosecution was able to prove beyond reasonable doubt that the accused alone is guilty. The evidence of prosecution

witnesses also point doubt to PW11 or PW6 or by PW6, PW11 and PW12 together with or without the accused, as all of them, along with the deceased, were present at the time of closure of the toddy shop. Whether the toddy shop will be closed when a person is lying in the shop is a question. There is no evidence that stomach of the deceased contained alcohol. There was no alcoholic smell at the time of postmortem. Even according to PWs 6, 11 and 12, deceased was having cash (including five hundred Rupee note in his pocket) and there was a quarrel with PW11, when he tried to take away the money and entrust it with PW6. Learned counsel for the appellant argued that there was a chance that all of them, i.e. PWs 6, 11 and 12 might have together inflicted injuries and accused being a poor person, was dragged in. In any event, it cannot be stated that the only hypothesis possible from the totality of evidence is that the accused and accused alone is guilty. Being a poor person, the accused was not able to defend his case by

engaging a competent lawyer. He was represented by State Brief before the trial court and before this Court. Yet, the court cannot convict a person on mere suspicion. Here, at the most, prosecution was able to prove that the accused can also be suspected, but, charges against him are not proved beyond doubt. In the above circumstances, we give benefit of doubt to the appellant/accused.

In the result, the appellant/accused is acquitted. His conviction and sentence passed under Section 302 IPC are set aside. He should be set at liberty forthwith, if he is not required to be in prison in connection with any other case.

(J.B.Koshy, Judge)

19th January, 2007

(K.P.Balachandran, Judge)

tkv

J.B.Koshy &
K.P.Balachandran, JJ.

Crl.A.No.2189 of 2004

JUDGMENT

19th January, 2007